BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CASCADE POLE COMPANY, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 90-7 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On January 11, 1990, Cascade Pole Company (Cascade Pole) filed an appeal with the Pollution Control Hearings Board, contesting the Department of Ecology's (Ecology) Order No. DE 89-S214. Subsequently Cascade Pole filed an appeal of Ecology Notice of Penalty No DE 89-S215 ($70,000). The appeal of Order No. DE 89-S214 was subsequently resolved with the parties filing a stipulation with the Board. The Notice of Penalty alleged Cascade Pole violated the State's dangerous waste regulations, Chapt. 173-303 WAC, at its Tacoma wood preserving facility, in 1987 and 1989.

The matter concluded on April 9, 1992, with the parties filing proposed Findings, Conclusions and Order. Oral argument was heard on January 20, 1992. Present for the Pollution Control Hearings Board were Members: Judith Bendor, Presiding, Harold S. Zimmerman, Chairman, and Annette S. McGee. Appellant Cascade Pole was represented by Attorney William D. Maer (Heller Ehrman, White & McAuliffe). Respondent Ecology was represented by Assistant Attorney General Lucy E. Phillips. A court reporter with Gene S. Barker and Associates (Olympia), took the proceedings. Neither party ordered the transcript.

Prior to the oral argument, the parties had filed cross-motions for summary judgment with supporting memoranda, declarations and exhibits. On January 20, 1992, the parties stipulated to the facts asserted in their respective summary judgment pleadings, declarations and exhibits and asked the Board to decide the appeal on the merits on the record as stipulated The Board then heard closing arguments.

On February 27, 1992, having reviewed the declarations and exhibits provided by the parties, the parties' summary judgment pleadings, and having heard counsel's contentions, the Board orally announced its decision to the parties. The Board provided written guidance to the parties on March 3, 1992. On April 9, 1992, the parties filed a proposed decision.

Issuance of the final written decision was held in abeyance, at the parties' request. The parties filed a Stipulation on May 20, 1992 and clarifying letter.

Having considered the foregoing evidence and argument, the Board now issues these:

FINDINGS OF FACT

I

Cascade Pole is a Washington Corporation. The Company treats wood (poles and finished lumber) at a wood preserving facility located at 1640 Marc Avenue, Tacoma, Washington.

II

Ecology is a State agency with statutory responsibility for enforcing the State's dangerous waste laws.

III

Cascade Pole treats wood with creosote, copper chromarsenate (CCA) and pentachlorophenol. The wood treatment process involves two types of operations: pressure treatment of wood in "retorts," using either pentachlorophenol or CCA, and dipping poles into

a "butt dip" tank, using creosote. Cascade Pole has four retorts, with the two northern retorts dedicated to treatment with PCP and the other two reserved for treatment with CCA. In the pressure treatment process, untreated wood is loaded into one of the four retorts. The wood is heated under pressure, forcing water out of the wood and preservative into the wood.

IV

Following treatment, the treated wood is removed from the retort onto what is known as the "dragout" area on rail lines which are on a movable transfer table used to align the rail lines with the retorts. The transfer table has drip pans.

V

At times relevant to this proceeding, Cascade Pole generated dangerous waste. Cascade Pole filed an annual generator report for 1989 which showed it generated 96,500 pounds of dangerous waste.

The Tacoma facility was not licensed, nor did it have interim status, as a TSD (treatment, storage or disposal) facility for dangerous waste.

VI

On December 22, 1987, Ecology inspected the Cascade Pole Tacoma facility. That inspection was described in the Declaration of Ross Potter. The inspection was conducted by Mr. Potter, an additional Ecology employee, and two representatives of the US EPA Region X Technical Assistance Team (TAT). Samples were collected during this inspection, as described in Finding of Fact XX. Ecology used proper chain of custody procedures.

VII

On June 7, 1989, Ecology conducted another inspection of the Cascade Pole Tacoma facility. The Ecology inspection team consisting of inspector Ms. Maria Peeler, Ms. Kay Seiler, Dangerous Waste Unit Supervisor for the Southwest Regional Office, and Ms. Lynn

Gooding. One purpose of this inspection was to take soil samples and to observe Cascade Pole's compliance with State dangerous waste generator requirements. Ecology used proper chain of custody procedures with the samples.

Ecology inspected the area where Cascade Pole accumulates drums of dangerous waste. Inspector Peeler saw 14 drums of dangerous waste with accumulation dates of March 3, 1989 (accumulated for 96 days). Five drums of K001 waste had accumulation dates of February 15, 1989 (accumulated for 112 days). Six drums of K001 waste had accumulations dates of February 16, 1989 (accumulated for 111 days). One drum of K001 waste had an accumulation date of February 17, 1989 (accumulated for 110 days).

VIII

During this June 1989 inspection, Ms. Seiler asked a Cascade Pole maintenance staff person, who identified himself as Phil, what was in a parts cleaning tank that was inside the maintenance shop, and:

His response indicated that the tank contained trichloroethane. Seiler Dec. at p. 10.

Ms. Seiler also used a meter that reads air concentrations of volatile and semi-volatile chemicals to measure air emanating from the tank. The readings indicated there were volatile solvents evaporating from the tank.

Ms. Peeler, Ecology Hazardous Waste Specialist for the Southwestern Regional office, also examined the parts cleaning tank at that time. She smelled the parts tank and noted:

> *It was full and had a sharp smell similar to chlorinated solvent. I believe the smell was not petroleum based solvent, which has a sweeter smell than the solvent I observed in the parts wash tank.* Peeler Dec. at p. 11.

Ms. Peeler also saw two product drums labeled Chevron 325 in the room, with service nozzles on one end. According to her, Chevron 325 is generally used a preliminary grease

dissipater, or cleaning solvent. Trichloroethane is a stronger solvent and provides faster and better cleaning of dirty parts. Peeler Dec. at p. 12.

IX

During the June 7, 1989 inspection both Ms. Seiler and Ms. Peeler requested Cascade Pole Manager of Environmental and Technical Affairs, Les Lonning, for:

> *Documentation on the type of solvents that they used at the facility and specifically to provide us Material Safety Data Sheets (MSDS) on all of the solvent products used at Cascade Pole. Those were not provided while we were on site, and it took some time to receive a partial set of information about them from Ms. Brothers.* Peeler Dec. at p. 17.

Mr. Lonning stated:

> *I explained to Ms. Peeler that the only solvent we mixed with used oil was Chevron 325 and that, to my knowledge, the shop did not use 1, 1, 1 Trichloroethane and, if we did, it would not be mixed with used oil.* Lonning Dec. at p. 4.

From April 1989 to September 1990, Mark Remlinger was employed by Cascade Pole at the facility as an Environmental Specialist. Among his responsibilities was assuring compliance with State dangerous waste regulations. He accompanied Ecology on its June 7, 1989 inspection. He stated:

> *Cascade Pole did not use TCA [trichloroethane] and certainly never mixed TCA with used oil.* [. . .] Remlinger Dec. at p. 6.

> *At the time I was employed by Cascade Pole, the Company did not use TCA in its vehicle maintenance shop. However, TCA is a common ingredient in aerosol cans and the contents are use up.* Remlinger Dec. at p. 8.

Remlinger explained that the principal solvent Cascade Pole used was Chevron 325, which is not a listed hazardous waste. Some of this was mixed with waste oil and shipped off

site. Remlinger Dec. p. 7. He stated that subsequent to the June 7, 1992 inspection, he sent to Ecology an MSDS sheet for Chevron 325. Remlinger Dec. at p. 7, and Remlinger Attachment A.

X

Philip Demarais is the manager of the plant. He stated he was not aware trichloroethane was used in the maintenance shop, and he did not tell the inspectors that Cascade Pole used trichloroethane or that it was mixed with used oil. Demarais Dec. at p. 2.

Roger Wicklund had worked at the maintenance shop for several years. He was at the inspection in June 1989. He spoke with Ms. Peeler and denied telling her Cascade Pole used trichloroethane or that it was mixed with used oil. Wicklund Dec. at p. 1. He does not say he spoke with Kay Seiler. He said he was not aware Cascade Pole used trichloroethane at that time. Id.

XI

On January 11, 1990, Ecology conducted another inspection (Peeler, Seiler and Ms. Pam Jenkins). Ms. Peeler saw the same parts cleaner outside the maintenance shop, that had been inside the maintenance shop during the June, 1989 inspection. Peeler Dec. at p. 22. Cascade Pole employee Wicklund said they had stopped using it 2 days earlier, with Safety Kleen now servicing the solvent. Two brand new Safety Kleen recycling parts cleaners were seen, one inside the shop where the old parts cleaner had been, and another in a smaller maintenance shed. Wicklund Dec. at p. 22.

XII

On January 19, 1990, Ecology returned (Peeler, Sonnenfeld and Saunders). Ms. Peeler requested from Mr. Remlinger documentation on the disposition of drums of waste taken from the parts wash tank seen on June 7, 1989 and January 11, 1990. Mr. Remlinger

left to look for documentation. Mr. Lonning requested that Ecology inspectors leave the premises.

Ecology returned that afternoon and took air samples from the old partis wash tank. They took waste oil samples too. The waste oil samples subsequently were unusable due to too much water and not enough oil. The air sample laboratory tests showed trichloroethane at 18,000 nanograms per cubic meter [18 ppb] in the vapors from the tank. The test showed undetermined amounts in lower levels. Peeler Dec. at p. 24. From this test and the earlier Cascade Pole employee statement, Ecology concluded, 1, 1, 1 trichloroethane had been introduced into the old tank and subsequently mixed with waste oil.

Trichloroethane is a listed dangerous waste.

XIII

In the Blais Declaration (as revised) there is some scientific literature indicating outdoor air concentrations of trichloroethane of 0.5 ppb and 0.9 ppb. Indoor air has been reported to contain an average of more than 40 ppb. The facts and circumstances of these concentrations have not been provided to the Board.

XIV

Currently solvent in the shop is handled by Safety Kleen. Exhibit B to the Remlinger Declaration is a copy of an unmanifested waste report from Safety Kleen covering the contents of the old parts washer. The report does not indicate the parts cleaner contained trichloroethane.

XV

It is undisputed the parts cleaning tank which Ecology inspector Seiler saw in the maintenance shop, during the June 7, 1991 inspection, contained solvent. It is undisputed the

waste solvent was mixed with waste oil and shipped off-site to a non-TSD facility. The key disputed factual issue is:

Did the waste oil/solvent mixture contain trichloroethane?

The manager of Environmental and Technical Affairs, Les Lonning, and Mark Remlinger, the Environmental Specialist, deny that tricholoroethane was being used in the shop, as does Mr. Roger Wicklund who works in the shop. So does Mr. Demerais. A careful reading of these declarations, however, does not reveal whether the managers had day-to-day knowledge of what was happening in the shop. Mr. Remlinger and Mr. Wicklund appear to have more direct responsibility in the shop.

However, both Ms. Seiler and Ms. Peeler say they spoke with a mechanic named Phil who worked in the maintenance shop. Cascade Pole did not deny that Phil, a mechanic, had worked there. Nor did Cascade Pole state they had attempted to find him. Cascade Pole has not provided this individual's affidavit, so the company has not directly rebutted Seiler's declaration regarding his statement.

The January 1990 test finding, seven months after the first inspection where trichloroethane/waste oil mixture became an issue, showed trichloroethane in the tank air at 18 ppb. Under circumstances not made clear, in the outdoors tricholorethane has been found at .5 to .9 ppb, and indoors at 40 ppb.

The trichloroethane question is a very close one factually.

The Board has heightened doubts about Cascade Pole's practices. Nonetheless, Ecology has the burden of proof and, by the slimmest margin, it has not proven trichloroethane was improperly handled.

XVI

On June 6, 1989, Cascade Pole had begun cleaning out its storm water catch basin at 11:00 p.m. During the clean-out operation, sludge was placed in 55 gallon drums and, when full, the drums were transported to a drum stacking area. At the time of the inspection on June 7, Cascade Pole knew the sludge contained chromium at 800 ppm and arsenic at 600 ppm.

During the June 7, 1989 inspection, Ecology saw 20 full unlabeled drums from the cleanout operation close to the east tank farm area. Cascade Pole conceded during the inspection that these drums contained K001, a listed dangerous waste. At the hearing Cascade Pole conceded these drums were not labeled, but contended they "would have been within a short time." The drums were likely labeled the next day.

There were another 30-35 drums with labels for K001, but no accumulation dates. These wastes had been generated from cleaning out a storage tank. Peeler Dec. at p. 7. Cascade Pole contends its personnel knew the accumulation dates, but had not yet written them on the drums. Remlinger Dec. at pp. 4-5.

XVII

Also on June 7, 1989, inspectors saw an open drum with sludge from the butt dip tank. Remlinger conceded the sludge from the tank was a hazardous waste. Remlinger Dec. at p. 4.

There were several unlabeled drums with unsecured lids that were near the sump. The drums contained volatile organics. Peeler Dec. at p. 19. Ms. Peeler stated that:

> *According the Cascade Pole's mechanic on duty, Phil, and Mr. Remlinger, the drums' contents' included soils and scrapings from the truck maintenance pad. Mr. Remlinger stated the drums were awaiting designation.* Peeler Dec. at p. 11.

Remlinger states these drums did not contain dangerous waste. Remlinger Dec. at p. 5. We find Ecology has not proven their drums contained dangerous waste.

XVIII

So many drums of waste were generated during the storm drain and butt tank drainage operations in June 1989, that Cascade Pole had run out of labels. Peeler Dec. at p. 7. By the next day, the drums from the storm drain clean-out had been labeled. Remlinger Dec. at p. 4.

XIX

At the time of each inspection, the Company was treating wood using both pressurized retorts and dipping. Treatment chemicals included creosote, pentachlorophenol and CCA. Wood treated with CCA has a greenish tinge.

During the December 22, 1987 Ecology insepction, Ross Potter, Hazardous Waste Inspector, took soil and surface samples from many areas where lumber were processed.

The lumber that had been treated in the retorts was moved via rails onto a "transfer table) and then to the drag out area (Potter sampling areas "B" and "C"). In 1984, Cascade Pole had installed drip pans below the rail cars in an efforts to catch the chemicals. The Company used the southern retorts to treat lumber with CCA. The northern retorts treated the lumber with penta. The lumber was then moved to storage aras (Potter sampling areas "F" and "G"), or to sampling area "A", if it had been treated with penta. The transfer area, drag lines and storage areas did not have containment other than the drip pans separating them from the soil surface. Potter Dec. at pp. 3-4 and color photographs.

There was a drainage ditch which received precipitation runoff from part of the site (sampling area "E"). Water from here drained to a low area with a sump (sampling area "D"). From there the water discharged into the Puyallup River via a floodgate. Potter Dec. at p. 13 and photographs.

XX

During the December 22, 1987 inspection, the following was observed: Area A, ground beneath the logs was darkly stained and there were oily sheens on the water pooled there. Potter Dec. at p. 13. Areas F and G, the gravels, soils and waters near and under the lumber stacks were stained green and light yellow. (See color photographs). Run-off from where the logs were stored was green in color. Peeler Dec. at p. 3.

Cascade Pole concedes that drippage from treated wood occurred. Lonning Dec. at pp. 2-3; Blais Dec. at p. 2; Rollins Dec. at p. 3; Remlinger Dec. at p. 2. At oral argument, counsel conceded the constituent ingredients if abandoned would be a dangerous waste.

During the December 1987 inspection, DOE took samples from locations A through G, with a split sample provided to the Company.

The test results showed:

	Fish Bioassay	EP Tox.	Total Penta 500 micro/kgm	Chromium 200 micro/kgm	Arsenic
A: Log Storage	No	No	Yes	Yes	Yes
B: Drag Line	Yes	No	Yes-72,000/kgm	Yes	Yes
C: Drag Line	Yes	No	Yes	Yes	Yes
D: Sump Sads.	No	No	Yes	Yes	Yes
E: Drainage Ditch	No	No	Yes	Yes	Yes
F/G: Lumber	Yes (2x)	Yes (2x)	Yes	Yes	Yes 12.8/16.6

Key: A = penta-treated log storage area: random samples from several locations, taken at soil surface and from shallow subsurface,. then mixed together. B = Drag Lines southern retorts: random samples, mixed, from soil surface and shall subsurface. C = Drag Lines northern retorts: random soils and subsurface, mixed. Samples contained mixed soil and small gravel. D = Sump: samples from bottom of sump, containing mud and fine silt, mixed. E = Drainage Ditch: samples from bottom and sides of ditch, mixed. F and G = treated lumber storage area: random samples, mixed.

Ecology also in 1989 took a sample from a water puddle right below the stored lumber, and found the concentrations exceeded dangerous waste levels.

XXI

Until December 12, 1989, when Order 89-S214 and Notice of Penalty 89-S215 were issued, Ecology did not advise Cascade Pole of the results of the 1987 sample analyses or that Ecology had concluded Cascade Pole was violating the dangerous waste regulations.

XXII

On June 7, 1989 inspection, the transfer table did not have containment between the drip pans and the ground. There were puddles of green liquid below stacks of recently treated lumber. Chemicals were seen dripping from wood that had been treated that day.

Samples were taken from around the drag-out transfer area (6 samples). There was evidence of recent drippage of CCA , Peeler Dec. at p. 25. Several inches of aggregate rock were removed, and the uncovered soils were sampled. One sample was taken from the lumber storage area near the north fence, and surficial soils and scraping samples were taken from the mechanic work pad near the old sump adjacent to the maintenance shop.

Test results showed that soil samples taken from the transfer table had chemical concentrations high enough for the soils themselves to be designated as dangerous waste for EP Toxicity for metals, PAH (Polyaromatic Hydrocarbons) and Halogenated Hydrocarbons. One sample showed PAH levels at 1.08% (extremely hazardous waste). Seiler Dec. at pp. 7-9. The following were specifically found:

Transfer Table (MCR 4): 21,700 micrograms/kgm Arsenic (WAC 173-303-090)

(MCR 2): 410,000 micrograms/kgm penta (WAC 173-303-102)

(MCR 6): 9,800 micrograms/kgm penta (WAC 173-303-102)

Peeler Dec. at pp. 18-19.

Soils below the transfer table and storage areas showed arsenic and chromium levels sufficient for the soils themselves to designate per EP Toxicity. See WAC 173-303-909(8).

XXIII

On January 11, 1992, DOE conducted another inspection. There were puddles of green and yellow water in the retort area and in the treated wood storage area. Peeler Dec. at p. 21. A sample was taken of the water in one puddle in the treated wood storage area. Tests of that sample showed arsenic at 5.27 mg/1 and chromium at 87 mg/1., sufficient for the liquid from the puddle to designate as a State dangerous waste for EP toxicity.

XXIV

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these parties and the subject matter. RCW 42.21B.300; Chapt. 70.105 RCW.

The Department of Ecology has the burden of proof in this penalty appeal. WAC 371-08-183. The Board decides the matter de novo.

II

Penalty Order No. DE-89-S194 asserts violations of these sections of Chapt. 173-303 WAC:

-070	Failure to designate solid waste appropriately (waste oil/solvent mixtures). Solid waste mixed with hazardous waste (solvent) must be designated as a hazardous waste.
-140(4)(a)(f)(g)	Failure to restrict and mitigate improper disposal of Washington State land disposal restricted waste.
-141(1) -950(1)	Failure to offer dangerous waste to a treatment, storage and disposal (TSD) facility.
-145(2)(3)	Failure to report releases of dangerous waste to the environment and failure to take measure to clean up those releases.
-170(1)(a)	Failure to designate solvent-laden waste oil as dangerous waste or hazardous waste.
-170(3)	Failure to store and dispose of dangerous waste on-site in accordance with the TSD facility requirements of Chapter 173-303 WAC.
-180(1)	Failure to manifest dangerous waste fuels sent (2) and (3): off-site.
-200(1)(a)	Failure to remove dangerous waste within ninety (90) days.
-200(1)(c)	Failure to mark the date when accumulation of dangerous waste began.
-200(1)(d)	Failure to label dangerous waste (drainage sludge containers).
-220(1) & -950(3)	Failure to accurately report dangerous waste activity in annual report.
-330	Failure to develop a training plan for the maintenance shop.
-340, -350 & -360	Failure to develop and implement a preparedness and prevention plan (maintenance shop).
-510(3)(a) & -515(1)(b)	Failure to follow special requirements for generators of dangerous waste fuels (trichloroethane F002 waste).
-630(5)	Failure to secure dangerous waste containers.

Prior to the hearing, Ecology withdrew the Notice of Penalty as to the alleged violation of WAC 173-303-130(4)(g).

III

The Board concludes Cascade Pole violated WAC 173-303-200(1)(a) by storing at least 40 drums of hazardous waste in excess of 90 days as described above.

IV

The specific WAC 173-303 sections violated if trichloroethane were mixed with waste oil and sent off-site for use as fuel are:

-070 and -170(1)(a) for failure to designate;
-141(1) and -950(1) for failure to offer d.w. (dangerous waste) to TSD;
-170(3) failure to store and dispose of d.w. in accord with TSD;
-180 failure to manifest for shipment;
-220(1) and -950 failure to accurately report on annual report;
-330 to -360 training and preparedness plans; and
-510(3)(a) and -515(1)(b) requirements of generators for d.w. fuels.

The violations alleged are potentially very serious because they involve unlawful disposal of a listed dangerous waste. We conclude Ecology did not prove the violations occurred. See Finding of Fact XV, above.

V

We conclude Cascade Pole failed to properly label and date dangerous waste drums, in violation of WAC 173-303-200(1)(c) and (d).

Prompt labeling is necessary, so that if emergency personnel had to come on-site, they would know what was in the drums. Before the company undertakes a large clean up operation, it is to ensure it has enough labels on site. The amount of time these drums remained improperly labeled relates to the amount of the penalty, not whether there was a violation. Some mitigation appears appropriate because of the short duration of the violations.

VI

We conclude there was a violation of WAC 173-303-630(5)(a) for failing to secure one drum of waste from the butt dip tank.

VII

Cascade Pole did not provide facts which contradict Ecology's facts regarding releases of dangerous waste to the environment, failure to mitigate and improper land disposal. Cascade Pole instead made a legal argument, contending:

1. Imposition of a penalty violates due process, i.e., Ecology failed to provide adequate notice that accidential drippage constituted an unlawful discharge.

2. A threat to public health or the environment has not been proven;

3. Ecology has to take samples of the drips themselves in order to prove their case;

4. The notice of violation and penalty was not issued within 2 years from when the government discovered the v iolation for which the penalty is sought, citing RCW 4.16.100 and .160, and U.S. Oil v. DOE, 96 Wn.2d 85, 92-93 (1981);

5. The land disposal regulations of WAC 173-303-140 and -170 do not apply.

Ecology has made a prima facie case that Cascade Pole released dangerous wastes into the environment on an ongoing basis, and was doing so at the time of both inspections in 1987 and 1989. In determining whether Ecology met their burden, common sense and reasonable inferences can be used.

The chemicals which Cascade Pole allowed to drip from the logs were "solid waste" under WAC 173-303-016 because they were discarded by being disposed of by discharge to the soil.

Solid waste can be dangerous waste by being specifically listed, or by characteristic. Ecology concedes that, at the times in questions, wood treating chemicals were not "listed" dangerous wastes.

It has been clearly demonstrated that Cascade Pole created dangerous waste soil when it allowed the chemicals to drip onto the ground. When tested, soil samples met the State dangerous waste characteristics for EP toxicity and because of concentrations of arsenic and chromium. Additionally, the soils were dangerous waste under WAC 173-303-101 because, at a concentration of 1,000 ppm, four samples from three locations killed at least 10 of 30 fish over a 96-hour period.

The soil was a persistent dangerous waste under WAC 173-303-102, using the test methods found in WAC 173-303-110(3)(a)(v) for Halogenated Hydrocarbons, and WAC 173-303-110(3)(a)(vi) for Polycyclic Aromatic Hydrocarbons.

IX

Cascade Pole contends Ecology had to test the drips. As a legal standard, this is not consistent with the overall statute and regulations. When an enforcement agency tests the receiving environment and finds concentrations exceed dangerous waste levels or cause toxicity, it is reasonable to infer that the material which dripped into it also displayed these characteristics. In this case, the enforcement agency was in the unusual situation where it could actually see the drips occurring. That does not mean that as a legal matter, it had to test the drips. The company has not rebutted the evidence and reasonable inferences. By analogy to the principles of *res ipsa loquiter*, the company had within its power the ability to contemporaneously sample and test the drips, if it so chose. It did not do so.

X

The penalty was issued in December 1989, one and a half years after the alleged 1987 violations. In the face of such evidence, and the evidence of continuing releases, the company in control of the operations cannot simply assert devoid of facts, that the two year period has elapsed. Contrast with Cascade Pole Company v. Ecology, PCHB 87-65, where the releases had ceased, and Ecology failed to prove a release of dangerous waste had occurred within two years of the notice of penalty. The company failed to show, for example, that it had imposed additional controls after the 1987 inspection such that the 1989 levels were due to events which necessarily had to have occurred more than two years earlier.

XI

Cascade Pole contends its releases were de minimis, yet provides no facts to support this assertion. Moreover, de minimus releases are only exempt if immediately reported. This reporting did not occur, even though the releases were evident from a visual inspection.

We conclude dangerous wastes were discharged in violation of WAC 173-303-145 in 1987 and 1989.

XII

The disposal of wood preservatives in on-site soils violated State land disposal restrictions of WAC 173-303-140(4)(a) and (f) for the disposal of extremely hazardous waste and leachable inorganic waste, and -170.

"Land disposal" is defined at WAC 173-303-140(3)(c) as:

> *placement* [...] *on land with the intent of leaving the dangerous waste at closure* [...]

It was clear that the material was abandoned. Therefore the intent prong of the test has been met. The rest of the proof is the same as for the unlawful discharge.

XIII

Ecology has met the "threat of harm to the environment" standard. The toxicity tests of the soil, alone, are sufficient to meet this standard.

Since Cascade Pole is a dangerous waste generator, it had to comply with WAC 173-303-170, in particular, the TSD requirements for disposing of waste. It failed to do so.

XIV

The Board does not have jurisdiction to decide the due process issue, raised by appellant, as it is a constitutional issue. Nonetheless, we address the notice issue because it affects the penalty amount. The notice of penalty is based in part on the 1987 sampling. The 1989 sampling confirmed what Ecology already knew. Yet Ecology waited a year and a half to notify the company about the 1989 penalty violations. Such delay by the regulating authority does not promote expeditious compliance, and undercuts to some degree, the purpose of a penalty.

XV

We decide the appropriateness of the $70,000 penalty de novo. The key purpose of civil penalties is to promote compliance by the company and the public. Coastal Tank Cleaning v. DOE, PCHB No. 90-61; Northwest Processing, Inc. v. DOE, PCHB Nos. 89-141 and 89-142; Penberthy Electromelt v. DOE, PCHB 90-136.

In determining whether the penalty was appropriate, we look at the violations in light of the circumstances.

In this case, some mitigation is appropriate. Ecology failed to prove any violations on the handling of tricholorethane. The labeling and dating violations (see Conclusions of

Law V) were of short duration. Only one drum was not properly secured. In addition, Ecology did not timely inform the company that it believed the 1987 drippage was a violation of the dangerous waste regulations.

XVI

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From the foregoing, the Board issues this:

ORDER

The $70,000 penalty is REDUCED to $50,000, and $20,000 of that $50,000 is SUSPENDED provided Cascade Pole does not violate Washington Environmental laws for three years.

DONE this 21st day of May, 1992.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding Member

HAROLD S. ZIMMERMAN, Chairman

ANNETTE S. McGEE, Member

Attchs: Parties' Stipulation and letter.

Ken Eikenberry
ATTORNEY GENERAL OF WASHINGTON
Ecology Division • 4407 Woodview Drive S E • QA-44 • Olympia, WA 98504-8077 • Fax (206) 438-7743

May 19, 1992

RECEIVED
MAY 20 1992
ENVIRONMENTAL
HEARINGS OFFICE

Judith A. Bendor, Presiding
Pollution Control Hearings Board
4224 - 6th Avenue SE, Building No. 2
P. O. Box 40903
Olympia, WA 98504-0903

Re: Cascade Pole Co. v. Ecology
PCHB No. 90-7, Stipulation

Dear Ms. Bendor:

Pursuant to your request in our telephone conference call of April 28, 1992, Bill Maer and I, on behalf of our clients, have agreed to the following clarification of the Stipulation filed in this matter. In addition to the clarification provided in this letter, the parties have renegotiated some provisions of the Stipulation. Please withdraw the Stipulation dated April 20, 1992, and replace it with the Stipulation enclosed with this letter and dated May 20, 1992.

This Stipulation is not intended to limit the scope of environmental regulations with which Cascade Pole must comply in order to avoid payment of the $20,000 portion of the penalty that was suspended by the Board's ruling, other than as specifically set forth in the Stipulation. You explained that the suspended portion of the penalty would become due and payable upon a violation by Cascade Pole of any environmental law or regulation--not just a violation of the dangerous waste regulations. The Stipulation clarifies when drippage at the Cascade Pole facility would constitute a violation of the dangerous waste regulations. Additionally, the Stipulation establishes in paragraph 3 certain restrictions to which Ecology has agreed regarding when Ecology would demand payment of the suspended portion of the penalty, including that the contingency only applies to violations ocurring after the effective date of the Board's Order.

Thank you for your attention to this matter. Please do not hesitate to call either myself or Bill Maer if you have any questions.

Very truly yours,

LUCY F. PHILLIPS
Assistant Attorney General
(206) 459-6800

LEP:la

Enclosure

cc: Esperanza P. Feria (w/enc.)
William D. Maer (w/enc.)

RECEIVED
MAY 20 1992
ENVIRONMENTAL
HEARINGS OFFICE

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CASCADE POLE COMPANY, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 90-7 STIPULATION

The Washington Department of Ecology (Ecology) and Cascade Pole Company, by and through their respective attorneys of record, hereby stipulate and agree as follows:

WHEREAS, on December 6, 1990, the federal Environmental Protection Agency (EPA) promulgated regulations amending 40 CFR Parts 264, 265, 270 and 271 governing, among other things, the management of drippage of preservative chemicals from treated wood at wood preserving facilities ("the federal regulations"),

WHEREAS, the federal regulations provide a deadline for installation of a process area drip pad at the Tacoma Plant, but an extension of that deadline will be necessary to accommodate further investigation and possible remediation at such Plant,

OFFICE OF THE ATTORNEY GENERAL
Ecology Division
4407 Woodview Drive SE 4th Floor
PO Box 40117
Lacey WA 98504-0117

WHEREAS, EPA may impose interim requirements to minimize drippage, pending construction of the drip pad, and

WHEREAS, the purposes of this Stipulation are to provide a standard for determining compliance with specified sections of the state dangerous waste regulations for the management of drippage of preservative chemicals from treated wood at Cascade Pole's Tacoma Plant and to apply that standard to determine whether the portion of Penalty No. DE 89-S215 suspended pursuant to Order of the Pollution Control Hearings Board (PCHB No. 90-7) should be paid by Cascade Pole Company.

NOW, THEREFORE, the parties agree:

1. Until such time as Ecology promulgates regulations governing the management of drippage of preservative chemicals at wood preserving facilities, the following should be deemed compliance by Cascade Pole with WAC 173-303-140(4), -145 and -170(3) as applied to drippage of preservative chemicals:

a. compliance with the federal regulations;

b. implementation of the contingency plan for excess drippage to the storage yard, with the understanding that Cascade Pole's long-term contingency plan may involve paving storage areas;

c. to the extent authorized by Ecology, implementation of the plan for Best Management Practices dated January 1991, written pursuant to Stipulation between Cascade Pole and Ecology dated December 17, 1990 (Exhibit A); and

OFFICE OF THE ATTORNEY GENERAL
Ecology Division
4407 Woodview Drive SE 4th Floor
PO Box 40117
Lacey WA 98504-0117

d. continued review and implementation of methods to minimize drippage at the transfer table.

If EPA imposes interim requirements on Cascade Pole to minimize drippage of wood preservative chemicals pending construction of a drip pad, Cascade Pole's compliance with those requirements and any other applicable provisions of the federal regulations will constitute compliance with the above-referenced state dangerous waste regulations.

2. This Stipulation applies only to drippage of preservative chemicals and only so long as Cascade Pole is complying with the federal regulations, Best Management Practices (Exhibit A), and any interim requirements as provided in the proceeding paragraph. This Stipulation does not preclude Ecology from alleging noncompliance with regulatory sections other than the above-referenced sections for dangerous waste management issues other than drippage.

3. The parties further stipulate to the following agreement. The Board's Order in PCHB No. 90-7 suspended a $20,000 portion of Penalty No. DE 89-S215 contingent upon no violations of environmental laws or regulations for a three-year period. In addition to the clarification of when drippage is a violation as set forth above, Ecology agrees to the following two limitations on the "no violations" contingency. First, the three year "contingency" period shall not begin to run until after entry of the Order and this Stipulation by the Board. Second, the $20,000 suspended portion of

OFFICE OF THE ATTORNEY GENERAL
Ecology Division
4407 Woodview Drive SE 4th Floor
PO Box 40117
Lacey WA 98504-0117

the penalty shall only become due and payable upon violations of environmental laws and regulations that are other than mere recordkeeping violations. Violations that shall cause payment of the suspended portion include, but are not limited to, the violations listed as Class I violations in "Appendix A, Violation Classification Examples," attached to this Stipulation as Exhibit B. In consideration of Ecology's agreement to so limit the contingency, Cascade Pole agrees that it shall not appeal the Board's ruling on this matter (PCHB No. 90-7) for further judicial review.

DATED this 20th day of May 1992.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY

By: Lucy E. Phillips

Lucy E. Phillips, WSBA #19251
Assistant Attorney General
Attorney for State of Washington
Department of Ecology

CASCADE POLE COMPANY

By: Telephonically approved 5-20-92

William D. Maer
HELLER, EHRMAN, WHITE
& McAULIFFE
Attorneys for Cascade Pole Company

T4 caspole stp

OFFICE OF THE ATTORNEY GENERAL
Ecology Division
4407 Woodview Drive SE 4th Floor
PO Box 40117
Lacey WA 98504-0117